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No. 371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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October 9, 1956

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PETITIONERS' REPLY BRIEF

I.

The Government's Brief in Opposition cites certain decisions of this Court which it says sustain the Ninth Circuit. Such is not the fact.

In *R. Simpson, Inc.* v. *Commissioner,* (1944) 321 U. S. 225, (B. 10) the question involved was the power

of the Supreme Court to grant a rehearing of the denial of certiorari in a tax case. The question arose because Section 1140 of the Internal Revenue Code, (the same Section involved in the case at bar) says a Tax Court decision becomes final under certain conditions, including:

> "Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * * "

In the *Simpson* case, this Court said that a decision of the Tax Court did not become "final" upon denial of a petition for certiorari and that this Court could grant a rehearing of the denial of certiorari provided the petition for rehearing was filed within 25 days after the denial. In other words, despite the specific wording of Section 1140, this Court held that it has the power to grant a rehearing of a petition for certiorari previously denied. The decision is obviously correct and the Government so agreed. The opinion states: (p. 230)

> "The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been 'salutary and in accordance with sound policy'."

It is our position that the *Simpson* case establishes the rule that the word "final" does not deprive courts in tax cases of the usual discretionary powers that judicial tribunals possess. The established rule is that a court has inherent power to relieve a party from a "final" judgment because of mistake, inadvertency, surprise or excusable neglect. This basic rule is now

expressed by Rule 60(b), Federal Rules of Civil Procedure, which states in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (6) any other reasons justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

While we do not contend that the Tax Court is bound by the Rules of Civil Procedure, we do contend that the Tax Court performs purely judicial functions. That being true, it has the inherent powers of any judicial tribunal to control, amend, open and vacate its decisions to accomplish justice.

As the Brief in Opposition states, Lasky has been deprived of his right of appeal due to oversight of counsel and through no fault of his. As a result, all his property, including his home, is tied up by tax liens. He does not have sufficient property to pay the tax claim. His case is meritorious. Justice demands that he be given the right to prosecute his appeal before he is stripped of all his worldly goods. This Court should grant the writ and liberally interpret the statute, as it did in the *Simpson* case.

In *Helvering* v. *Northern Coal Co.,* (1933) 293 U. S. 191, (B. 10) this Court had previously affirmed the Courts of Appeals on the merits by an equally divided Court. Nearly six months after the mandates issued, petitions for rehearing were filed. This Court held that it could not grant a re-hearing more than 30 days after the date of issuance of the mandates because of the statutory provision which reads that a Board of Tax Appeals' decision becomes final:

> "Upon the expiration of 30 days from the date of the issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

It is obvious that the later *Simpson* case greatly modified the earlier interpretation of Section 1140 in the *Northern Coal Co.* case in order to reach a result which "enables us to do justice to the party if he appears to have the right of the controversy * * *." It is utterly impossible to reconcile the *Northern Coal Company* case with the later *Simpson* case and the case at bar. This emphasizes the necessity for granting the writ and settling the law.

Old Colony Trust Co. v. *Commissioner,* (1929) 279 U. S. 716, (B. 10) did not consider the question here involved. It held that appeals from the Board of Tax Appeals (now the Tax Court) to the Courts of Appeals involve a "case or controversy", so could properly be heard by Courts of Appeals in exercising their judicial function. This Court knew from consideration of *Blair* v. *Oesterlein Machinery Co.,* (1927) 275 U. S. 220, that the Board of Tax Appeals exercised powers "which are judicial in character." (p. 227)

The Government also argues in paragraph 1 (B. 11) that there is some peculiar necessity in Tax Court

cases to know when a decision is final. This position is not realistic. Assessments, credits, abatements and refunds of taxes are routine matters. For example, in the case of jeopardy assessments the assessment is made and often tax is collected. If the case is later settled, or decided by the Tax Court, the Commissioner may have to make credits, abatements or refunds. Likewise, if a taxpayer appeals a Tax Court decision and elects to pay the tax rather than give bond, he receives a refund under Section 1146, Internal Revenue Code, if the Tax Court is reversed. In other words, assessment and collection of a tax is not necessarily the final step before tax liability is determined.

There is less need for finality in tax cases than in bankruptcy cases because, in tax cases, the rights of third parties are not involved. This Court found no difficulty in a bankruptcy case to disregard the thirty-day limit on appeals where such action was necessary to do justice and grant the right of appeal. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* (1937) 300 U. S. 131.

II.

The Government contends that *Reo Motors Inc.* v. *Commissioner,* 219 F. (2d) 610, (Pet. 5-7) and *Buttgenbach* v. *Commissioner,* 63 F. (2d) 630 (Pet. 7-8) are not in conflict with the case at bar because, in the *Reo* case, there was a mutual mistake of fact and, in the *Buttgenbach* case, the parties stipulated that the decision be vacated after it became "final." This argument does not answer the basic question of the power of the Tax Court to vacate its decisions after they have become "final." We submit that the Tax Court either has that power, or it does not have that

power. Certainly, the parties to litigation cannot confer jurisdiction upon the Tax Court, or any other judicial tribunal, by stipulating that it has jurisdiction.

Despite the effort to here distinguish the *Reo Motors* case, the Government in its brief in the Sixth Circuit in that case made substantially the same argument and cited substantially the same cases as it is here citing. It argued that "Since the finality of a Tax Court decision deprives the Tax Court of *jurisdiction* to alter its decision, the decision must stand regardless of the basis for requested relief therefrom." Having lost the *Reo* case, the Government now says the *Reo* case is not in conflict with the case at bar on the question of jurisdiction because there is a different factual basis for the action of the Sixth Circuit. However, it cannot be denied that the *Reo* case holds that the Tax Court has the power to vacate "final" decisions and the case at bar holds the Tax Court lacks such power. In the Ninth Circuit, in the case at bar, the Government argued that the *Reo* case was not correctly decided.

III.

The Brief in Opposition makes no comment on the petitioners' contention (Pet. 13) that the question presented involves an important question of Federal law which has not been, but which should be, settled by the Supreme Court. It is significant that "Taxes, The Tax Magazine" for October, 1956, concludes its comment on the *Lasky* case by stating "Lawyers will look to the Supreme Court's decision because of its potential effect on the practice of tax law." The entire comment is:

> "Like Lazarus, the question as to whether the Tax Court is in truth a court or just an administra-

tive agency comes to life. Its recent resurrection is in *Lasky* v. *Commissioner*. In addition to its importance to the taxpayer who has almost $250,000 at stake, the case is important to the question: What is the Tax Court—animal, vegetable or mineral? Mr. Lasky owned quite a piece of a movie, *Sergeant York*. He went to the Tax Court claiming that the money he received was capital gain but that it was stamped ordinary income.

"Now to the other issue—a decision of the Tax Court becomes final three months after it is rendered. More than three months after the decision in the *Lasky* case, the Tax Court was asked to vacate its earlier decision on the ground of excusable neglect—a power which is confined to United States district courts and not applicable to executive agencies. Here's what the Ninth Circuit said about the Tax Court's action as it held that the Tax Court was without jurisdiction to set aside its first decision:

> " 'Though not a court at all but merely an administrative agency it assumed the power of a district court and in December, 1954, it granted petitioners' motions to vacate its decision of April 8, 1954, and for the taking of additional evidence. After additional evidence was taken, the Tax Court rendered a second decision reaching the same result as in the first. The petition for review of the second decision was filed well within three months of the date it was entered.'

"Now the First, Second, Third and Ninth Circuits hold that the Tax Court is not a court. The Sixth Circuit says it is. Now the issue is in the black-robed lap of the Supreme Court. Ironically, the government contends that the Tax Court is not a court and that it is the taxpayer who is contending that it is. There are some knotty problems of

administrative law involved in this question. Lawyers will look for the Supreme Court's decision because of its potential effect on the practice of tax law."

While the foregoing quotation is not in all respects accurate, it does show that an outstanding magazine devoted to taxes believes the question is important.

Respectfully submitted,

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October 9, 1956

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 235 F. (2d) 97, and appears in the record at page 476.

The Findings of Fact and Opinion of the Tax Court are reported in 22 T.C. 13 (R. 62-92).

The order of the Tax Court granting a rehearing herein (R. 135) and the orders and decisions of the

Tax Court and memoranda sur orders and decisions (R. 138-145) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 13, 1956. The petition for a writ of certiorari was filed August 31, 1956, and was granted November 5, 1956. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

QUESTION PRESENTED

On December 13, 1954, the Tax Court entered an order vacating and setting aside its decisions of April 8, 1954, and granted a further hearing on the merits, because:

> "The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law." (R. 138)

The further hearing on the merits was held on January 21 and January 26, 1955.

The question for decision is:

Did the Tax Court have the discretionary power to enter its order of December 13, 1954, vacating and setting aside its decisions of April 8, 1954, and granting petitioners a rehearing on the merits, or did § 1140 (a) Internal Revenue Code of 1939, which provides that Tax Court decisions become "final" if no appeal is filed within three months, deprive the Tax Court of such discretionary power?

STATUTES INVOLVED

The statutory provisions involved are Sections 272, 1100, 1113, 1117, 1140 and 1142 of the Internal Revenue Code of 1939 and Sections 7422 and 7483 of the Internal Revenue Code of 1954. They are printed in the Appendix hereto, pages 44 to 48.

STATEMENT

The basic facts presenting the issue in this case are that on April 8, 1954, the Tax Court entered its findings of fact and opinion in the case. On the same day, it entered separate decisions determining the tax liability of each petitioner. Due to a misfiling of the decisions in the office of petitioners' attorneys, neither the attorneys nor the petitioners were aware that the decisions had been entered until the three month period for appeal had expired. Thereafter, present counsel promptly investigated the situation and concluded there were meritorious grounds for a rehearing. Accordingly, appropriate motions were filed, hearings held thereon, and a rehearing granted for good cause. After the rehearing, the Tax Court reaffirmed the conclusion reached after the first trial. Petitioners appealed to the Ninth Circuit which dismissed the appeal on the ground that the Tax Court did not have the power to grant the rehearing because it was "not a court at all but merely an administrative agency" which "assumed the power of a district court." (R. 477)

In more detail, the facts are:

On March 23, 1940, Jesse L. Lasky acquired from Sgt. Alvin C. York the exclusive motion picture, radio, literary and dramatic rights to the life story of York. (R. 20, 23) Thereafter, on May 15, 1940, Lasky conveyed all his rights, title and interest under the contract

of March 23, 1940, with York, to Warner Bros. Pictures, Inc. In consideration for all his rights, title and interest under the contract of March 23, 1940, Warner Bros. agreed to pay Lasky $40,000, plus a certain percentage of the gross film rentals or sales realized from the distribution of the photoplay. (R. 38, 41) In addition, by a separate and distinct contract of May 8, 1940, Warner Bros. employed Lasky as a co-producer for the purpose of producing the play based upon the life of Sgt. York. (R. 385)

After the picture "Sergeant York" was released, a dispute arose and dissatisfaction existed between Lasky and Warner Bros. Lasky was dissatisfied with the way Warner Bros. was distributing the picture. (R. 169, 241, 275, 277, 314, 345) He was also dissatisfied with the receipts that were tendered him from the distribution of the picture. After consulting his attorney, certain checks tendered to Lasky by Warner Bros. as his share of the film rentals were returned to Warner Bros. (R. 77, 241, 278, 315, 351) At that time, it was contemplated that an accounting of the distribution by Warner Bros. would be demanded by Lasky. However, Lasky wished to avoid a break with Warner Bros. because he was in their employ as a producer and wanted to remain in their employ in that capacity. He had started a new contract with Warner Bros. and was anxious to produce the "Adventures of Mark Twain" for them. (R. 349-350) Accordingly, Lasky decided to sell his rights under the contracts of May 15, 1940 and, on December 4, 1942, he sold them to United Artists Corporation for $805,000. (R. 80, 254, 281, 286, 322, 330, 350, 353) Later, United Artists Corporation sold the contract to Warner Bros. for $820,000. When United Artists Corporation purchased the contract, it was a bona fide purchase and

there was no understanding that the contract would be resold to Warner Bros. (R. 305, 351)

Bessie Lasky and Jesse L. Lasky each reported $402,500 as long term capital gain on his or her income tax return filed for 1942. (R. 22)

On November 28, 1949, the Commissioner of Internal Revenue sent petitioners, by registered mail, notices of deficiency, in which he determined that the gain on the sale was ordinary income. As a result, the Commissioner determined that the petitioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that the petitioner, Jesse L. Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,515.44. (R. 10, 14, 62)

On January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States. (R. 7-14) The case was tried before the Tax Court on December 10 and 11, 1951, in Los Angeles, California. On April 8, 1954, the Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decisions ordering and deciding that the taxpayers owed the deficiencies in income tax for the taxable year 1943 in the amounts determined by the Commissioner of Internal Revenue. (R. 92, 93)

After the receipt of the Findings of Fact and Opinion by petitioners' counsel, a conference, attended by Lasky and counsel, was held. At that conference, the possibility of having the decisions reversed on appeal and other matters were discussed (R. 101, 102). At the conference, Lasky was advised that the decisions had not been received and that he would have three months from the date of the decisions within which

to file an appeal. On or about July 26, 1954, or on or about August 2, 1954,[1] counsel for Lasky for the first time discovered that copies of the decisions of April 8, 1954, had been received but had been misfiled and placed in the correspondence side of counsel's file in the Lasky case, without being called to counsel's attention. On the same day, counsel telephoned Lasky and advised him that, in going through his file, he had found the decisions and that they were dated April 8, 1954. (R. 95, 100, 101, 103) Upon receipt of this information, Mr. Lasky asked that the decisions be sent to him. This was done under date of August 5, 1954 (R. 97)

On August 24, 1954, present counsel for petitioners filed with the Tax Court a motion for leave to file a motion to vacate decisions out of time (R. 93) and a motion to vacate decisions. The said motion to vacate decisions did not state any facts other than, "A statement of facts and supporting affidavits in support of this motion will be filed in the near future." (R. 94) On September 10, 1954, four affidavits in support of motion were filed. (R. 95) On October 11, 1954, a statement of facts in support of motion to vacate decisions and for rehearing was filed. (R. 484)

The motion for leave to file motion to vacate decisions out of time was granted August 26, 1954. (R. 94)

Thereafter, on September 14, 1954 (R. 106) and September 16, 1954, the Tax Court held hearings on the motion to vacate decisions. (R. 122)

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[1] Mr. Lasky's and Mr. Rogers' affidavits (R. 96-100) state the date as August 2, 1954. Mr. Green's and Mr. Harkins' affidavits (R. 102-105) state the date as July 26, 1954. Counsel's letter transmitting the decisions to Mr. Lasky is dated August 5, 1954 (R. 98).

On October 11, 1954, petitioners lodged with the Tax Court a motion for leave to file an amendment to the motion to vacate decisions out of time and an amendment to the motion to vacate decisions. The motion was granted October 15, 1954. (R. 133, 134) The motion, as amended, read:

> "Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, for the purpose of granting petitioners a rehearing of the case on its merits.
>
> "The statement of facts and supporting affidavits in support of this motion are incorporated herein by reference." (R. 134)

The statement of facts represented that if the rehearing were granted, the petitioners would show the decision of the Tax Court was wrong on its merits. In detail it was represented: (R. 485)

> "(a) That the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940, by which the petitioner sold to Warner Brothers all his rights to the Sergeant York Story and Warner Brothers agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay are entirely separate and distinct from the employment contract between petitioner and Warner Brothers dated May 8, 1940.
>
> "(b) The evidence would show in detail that a bona fide dispute existed in 1942 between petitioner and Warner Brothers. Additional witnesses would be produced to establish this important fact.
>
> "(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale

to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

"(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

"(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943."

On December 13, 1954, the Tax Court entered an order vacating and setting aside the decisions of April 8, 1954, and granting the petitioners a further hearing on the merits. (R. 135) The Tax Court stated its reasons for granting the rehearing as follows:

"The Court concluded that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original Findings of Fact and conclusions of law. * * * " (R. 138)

Thereafter, a rehearing of the case on the merits was held in Washington, D. C. on January 21 and January

26, 1955. (R. 300-385) At the rehearing, the testimony of the accountant for the petitioners was taken for the first time. (R. 308-335) Also received for the first time was the testimony of Gradwell Sears who was, in 1942, the executive vice-president of United Artists, in charge of world-wide distribution of pictures, who had been, prior to October, 1941, president of a subsidiary of Warner Bros. which distributed Warner Bros.' pictures. He had been the distributor of the picture "Sergeant York" for Warner Bros. (R. 301-308) The testimony of the president of United Artists in 1942 was also taken for the first time. (R. 356-374) Additional testimony of Jesse L. Lasky was received. (R. 335-354) On June 30, 1955, the Tax Court in the case of each petitioner entered (a) memorandum sur order and decision and (b) an order and decision again ordering and deciding upon the rehearing and reconsideration of the case on the merits that there were deficiencies in income tax for the taxable year 1943 as determined by the Commissioner of Internal Revenue. (R. 138-145)

Petitions for review were filed in the Court of Appeals on August 10, 1955, to review the orders and decisions entered by the Tax Court on June 30, 1955. (R. 145)

The Court of Appeals dismissed the appeal on the ground that the Tax Court was without jurisdiction to set aside its decision of April 8, 1954. (R. 476-481)

The petition for writ of certiorari was filed August 31, 1956, and was granted November 5, 1956. (R. 486)

SUMMARY OF ARGUMENT

The problem in this case is a broad one and involves the determination of the status in our judicial system of the Tax Court of the United States. The argument is directed, first, to the discretionary power of the Tax Court to vacate its decisions out of time and, second, to a discussion of the background, origin and functions of the Tax Court. Knowledge of the latter is essential in order to decide the problem presented by the case.

The Court of Appeals below held the Tax Court is "not a court at all, but merely an administrative agency" which had "assumed the power of a district court." The Sixth Circuit, when presented with the same question, held the Tax Court is not an administrative agency but "is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions." *Reo Motors, Inc.* v. *Commissioner,* (C.A. 6, 1955) 219 F. (2d) 610. The *Reo Motors* opinion cites many cases in support of its position. The Fifth Circuit, likewise, has directed the Board of Tax Appeals (now the Tax Court) to vacate a decision entered more than three years prior thereto. *Buttgenbach* v. *Commissioner,* (1933) 63 F. (2d) 630.

The Third Circuit points out that, although the Internal Revenue Code designates the Tax Court as "an independent agency in the Executive Branch of the Government", this is "merely a matter of legal semantics since, whatever it may be called, it is an 'independent' judicial agency." *Stern* v. *Commissioner,* (1954), 215 F. (2d) 701. The Third Circuit supports this conclusion with numerous citations.

Congress, admittedly, has provided that the Tax Court shall have the powers and procedures of a court. These characteristics and powers are not taken away because "for convenience of housekeeping"[2] the Tax Court is placed in the Executive Branch of the Government.

This Court and the Courts of Appeals have recognized that the Tax Court has the inherent powers of a Court in many important situations. These include:

(a) The power to apply the doctrine of res judicata, collateral estoppel, or estoppel by judgment.

(b) The power to pass upon the constitutionality of taxing statutes and to hold such statutes unconstitutional.

(c) The power to declare Treasury Regulations invalid.

(d) The power, concurrent with District Courts, in bankruptcy cases, to determine the bankrupt's tax liability.

If these inherent powers of a court are at this late date held inapplicable because the Tax Court "is not a court at all", the precedents will become valueless and chaos in the administration of the tax laws can result.

Although the Internal Revenue Code says that a Tax Court decision becomes final upon the denial of a petition for certiorari, this Court has held that the literal language of the statute must give way to accepted court practice. *R. Simpson & Co., Inc.* v. *Commissioner,* (1944) 321 U. S. 225.

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[2] Stern v. Commissioner (CA 3, 1954), 215 F. (2d) 701.

It is our position that the *Simpson* case establishes that the word "final" does not deprive courts in tax cases of the usual discretionary powers which judicial tribunals possess. Courts have the inherent power to relieve a party from a "final" judgment. This basic power is now expressed in Rule 60 (b), Federal Rules of Civil Procedure.

The Court below laid much stress upon *Helvering* v. *Northern Coal Co.*, (1934), 293 U. S. 191. We feel that the later case of *R. Simpson & Co., Inc.*, (1944) 321 U. S. 225, greatly modified the *Northern Coal Co.* case to establish a rule which "enables us to do justice to the party if he appears to have the right of the controversy."

There is no greater need for finality in tax cases, where third parties are not involved, than in bankruptcy cases where the rights of third parties are involved. This Court has held that a bankruptcy court may set aside an order dismissing a petition and rehear the cause after the time for appeal has expired. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U. S. 131.

The mere fact that Section 1140 Internal Revenue Code states when a decision of the Tax Court shall become final can have no unique significance on the power of the Tax Court over its decisions or judgments. There comes a time when the judgment or decision of all courts becomes final so as to preclude an appeal. For instance, a judgment or order of a District Court becomes final 30 days after its entry, unless motions are made subsequent to its entry which terminate the running of the time for appeal. See Rule 73 (a), Federal Rules of Civil Procedure. However, the inherent power of the District Court to vacate its

judgment after time for appeal has elapsed cannot be doubted.

Some of the decisions cited by the Court below indicate some peculiar necessity in Tax Court cases to know when a decision is "final." This position is not realistic. Assessments, credits, abatements and refunds of taxes are being made all the time. Such is accepted administrative procedure.

A District Court in a tax refund suit would have the power to vacate its judgment under the state of facts which exist in the case at bar. Consequently, it can be seen that from an administrative viewpoint the fact that a "final" decision might be reopened or vacated does not create burdensome uncertainty. That is particularly true because the rights of third parties are not involved.

The decisions interpreting § 1140 show that the section does not mean that in all situations the decision becomes "final" three months from the entry of decision if no petition for review is filed. It has long been held that if a petition for rehearing is seasonably presented, the time limited for appeal does not begin to run until the petition is disposed of. This is consistent with the interpretation of other statutes.

The granting of the rehearing in this case was discretionary with the Tax Court. Petitioners were before the Tax Court, not as a matter of right, but by special leave of the Court. The Tax Court properly exercised its discretion in vacating the decisions and granting a further hearing on the merits.

It is necessary to understand the legislative and judicial background, origin and functions of the Tax Court.

Prior to 1924, taxes were summarily collected. If the Government asserted a tax, the taxpayer had no alternative but to pay, file a claim for refund and, if the claim was rejected or not acted upon within a certain period, sue for recovery. To remedy this unsatisfactory situation, the Secretary of the Treasury recommended the establishment of an informal Board of Tax Appeals to settle tax controversies. Provision for such an informal Board was included in the Revenue Bill of 1924, reported by the Ways and Means Committee and passed the House. It was likewise reported by the Finance Committee.

The entire character of the Board was changed by an amendment made and adopted on the floor of the Senate. As amended, the bill provided for a judicial tribunal "in all its essentials practically a court of record." The amendment was accepted by the conference and became part of the Revenue Act of 1924. The Board had no duties, purposes, or functions which were not judicial. However, its decisions were not final and either party could, after decision by the Board, litigate the case *de novo*.

In deciding *Williamsport Wire Rope Co.* v. *United States*, (1928), 277 U. S. 551, this Court obviously had not been informed of the legislative history outlined above because the Court relied upon and cited the Committee reports.

The Revenue Act of 1926 provided that decisions of the Board of Tax Appeals would be final and reviewable only by Courts of Appeals. The legislative history

of the 1926 Act shows that Congress intended to create a judicial, rather than an administrative tribunal. The 1926 Act, for all practical purposes, gave the Board concurrent jurisdiction with District Courts and the Court of Claims in tax cases. Its jurisdiction was increased so that it had the power to determine the correct tax liability. It could increase the deficiency asserted by the Commissioner, or determine that a refund was due the taxpayer.

When the Revenue Bill of 1928 was before Congress, the Ways and Means Committee recommended that the bill remedy the rule of *Chicago Railway Equipment Co.* v. *Blair*, (C.A. 7, 1927), 20 F. (2d) 10, which had treated the Board as an investigative body. The Finance Committee was of the opinion that the existing law clearly contemplated judicial and not administrative proceedings by the Board, so could see no need for further legislation on the subject.

The Revenue Act of 1942 changed the name of the Board to The Tax Court of the United States and the titles of members thereof to Judges. In 1948, Congress enacted a law providing that Courts of Appeals shall have exclusive jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

The provisions of the Internal Revenue Code of 1954 dealing with the Tax Court are in Chapter 76 "Judicial Proceedings."

ARGUMENT

The problem in this case is a broad one and involves the determination of the status in our judicial system of the Tax Court of the United States. The immediate

question is directed to the power of the Tax Court, in its discretion, to vacate and set aside a decision or judgment after the three-month period for appeal to a Court of Appeals has expired. To express it another way: Does the Tax Court, like other courts, have the inherent power to control, amend, open and vacate its decisions to accomplish justice in accordance with the modern trend? In order to decide this question, it is necessary to understand the background, origin and functions of the Tax Court.

Consequently, this argument will be directed first to the immediate problem as developed by the case law and, second, to a discussion, beginning at page 32, hereof, of the legislative and judicial history of the Tax Court and its predecessor, the Board of Tax Appeals.

The Court of Appeals below in the case at bar held that the Tax Court is "not a court at all, but merely an administrative agency" which had "assumed the power of a district court." Proceeding on this premise, the Ninth Circuit concluded the Tax Court did not have the power to grant the rehearing. This result is in direct conflict with decisions of other courts of appeals which hold that the Tax Court is not an administrative agency, but "is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions." The quoted statement is from *Reo Motors, Inc.* v. *Commissioner,* (C.A. 6, 1955) 219 F. (2d) 610.

In the *Reo* case, after this Court had determined the excess profits tax liability of Reo Motors, Inc. for 1941, (338 U.S. 442) and the decision became "final", the taxpayer asked leave to file a motion asking the Tax Court to vacate its decision. The reason was that

the stipulation of facts upon which the Tax Court originally decided the case and was affirmed by this Court, contained a mutual mistake of fact which resulted in an omission from invested capital of over two million dollars. The Tax Court denied the motion for leave to file the motion to vacate the decision.

Upon appeal, the Sixth Circuit reversed the Tax Court, stating:

> "We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e.g. *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117 (1926); (5 AFTR 5842); *Stern* v. *Commissioner,* 215 F. (2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis.* Cf. *United States* v. *Morgan,* 346 U. S. 502 (1954); *United States* v. *Mayer,* 235 U. S. 55 (1914); Rule 60 (b), Federal Rules of Civil Procedure.
>
> "This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner of Internal Revenue,* 63 F. (2d) 630 (1933), (12 AFTR 257); and very recently by the Tax Court itself in *Bessie Lasky, Jesse L. Lasky* v. *Commissioner,* Tax Court Dockets Nos. 26,396 and 26,397 (1954)."

The only difference in the basic facts between the case at bar and the *Reo Motors* case is that, in the

Reo Motors case, the Tax Court refused to exercise its discretion and was required to do so by the Sixth Circuit. In the case at bar, the Tax Court did exercise its discretion and was reversed by the Ninth Circuit for having done so.[3]

The case at bar likewise is in direct conflict with *Buttgenbach* v. *Commissioner*, (C.A. 5, 1933) 63 F. (2d) 630.

In the *Buttgenbach* case, the taxpayer and the Commissioner in 1931 executed a joint petition asking the Board of Tax Appeals (now the Tax Court) to vacate and set aside an order entered in 1927 determining a tax liability. The Board of Tax Appeals denied the joint petition because of a supposed lack of power. The Fifth Circuit reversed on the ground that the Board had such power, stating:

> "Whether the Board be treated as a court or a departmental agency with quasi judicial functions, we are of opinion that it may in its discretion vacate such an order as this is, reinstating the matter for hearing before it on its merits or accepting a new stipulation touching the liability."

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[3] This factual distinction is correct although the Ninth Circuit in the case at bar states that, in the *Reo Motors* case, the Tax Court ordered the decision set aside. (R. 479)

[4] In other jurisdictional limitations cases, Courts of Appeals have disregarded the literal language of the statute. Sec. 272 (a) (1) 1939 Code provides that petitions must be filed with the Tax Court within 90 days from the date of the mailing of the notice of deficiency. In situations where the petitions were not actually filed within the 90 day period but in the ordinary course of the mail should have been received by the Tax Court within the 90 day period, Courts of Appeals have held that the petitions were timely

In support of the Ninth Circuit's opinion in the case at bar are the several cases cited in that opinion.

It is true that the Internal Revenue Code designates the Tax Court as "an independent agency in the Executive Branch of the Government". However, the Third Circuit, in *Stern* v. *Commissioner*, (1954) 215 F. (2d) 701, 706, points out this is "merely a matter of legal semantics since, whatever it may be called, it is an 'independent' judicial agency." The Court stated in the *Stern* case (p. 707):

> "But although Congress in the Internal Revenue Codes has continued to call the tribunal 'an independent agency in the Executive Branch of the Government' it has at the same time more realistically designated it as a court and its members as judges.[6] And it is the fact that from its inception as the Board of Tax Appeals in 1924 it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government.[7] Its powers are

[6] Act of October 21, 1942, § 504(a), 56 Stat. 957; Internal Revenue Code of 1954, § 7441.

[7] The jurisdiction which the Tax Court has exercised since 1942 under the Renegotiation Acts is likewise judicial in nature, involving controversies between government contractors and the Government as to whether profits received by such contractors are excessive when measured by the standards laid down in the Acts. Maguire Industries v. United States, 1949, 114 Ct. Cl. 687, 86 F. Supp. 905, cert. den. 340 U.S. 809.

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filed and the Tax Court had jurisdiction. *Arkansas Motor Coaches, Ltd., Inc.* v. *Commissioner*, (C.A. 8, 1952) 198 F. (2d) 189; *Central Paper Co.* v. *Commissioner*, (C.A. 6, 1952) 199 F. (2d) 902; *Detroit Automotive Products Co.* v. *Commissioner*, (C.A. 6, 1953) 203 F. (2d) 785.

wholly judicial in character.[8] It has never been given any administrative powers or functions nor has it ever had any investigatory, regulatory or policy-making duties or powers. Since the passage of the Revenue Act of 1926 its decisions have been final and reviewable only on the record by the United States courts of appeals.[9] Since 1948 the scope of that review has been the same as in the case of like decisions of the district courts.[10] The

[8] Blair v. Oesterlein Co., 1927, 275 U.S. 220, 227 [6 AFTR 7080]; Helvering v. Lazarus & Co., 1939, 308 U.S. 252, 255 [23 AFTR 778]; Uncasville Mfg. Co. v. Commissioner of Internal Revenue, 2 Cir. 1932, 55 F. 2d 893, 897 [10 AFTR 1208], cert. den. 286 U.S. 545, Commissioner of Internal Rev. v. Liberty Bank & Trust Co., 6 Cir. 1932, 59 F. 2d 320, 323 [11 AFTR 488]; Helvering v. Continental Oil Co., D.C. Cir. 1933, 68 F. 2d 750, 753 [13 AFTR 582], cert. den. 292 U.S. 627; Irwin v. Lawson, 5 Cir. 1938, 94 F. 2d 187, 190 [20 AFTR 674].

[9] In reporting to the House of Representatives the bill which became the Revenue Act of 1926 the Committee on Ways and Means said:

"In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty . . ." House Report No. 1 on H.R. 1, 69th Cong., 1st Sess., p. 20.

[10] This was accomplished by section 36 of the Act of June 25, 1948, 62 Stat. 991, which amended section 1141(a) of the Internal Revenue Code of 1939 so as to make the decisions of the Tax Court reviewable by the courts of appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." It is clear that by this action Congress intended (see Senate Report No. 1559 on H.R. 3214, 80th Cong., 2d Sess., pp. 2, 13) to repeal the rule laid down in Dobson v. Commissioner, 1943, 320 U.S. 489 [31 AFTR 773], which had severely limited the scope of

> Tax Court is thus for all practical purposes a judicial tribunal operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an 'independent' judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government, but only by the federal appellate courts."

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review of Tax Court decisions upon the theory that the court was a specialized administrative body. Congress thus made plain that it regarded the Tax Court as a judicial tribunal rather than an administrative agency and intended that its decisions should be subject to the same review accorded judicial decisions.

This action by Congress following its previous action in 1942 in calling the agency a court and its members judges rendered obsolete Chief Justice Taft's early dictum in Old Colony Tr. Co. v. Comm'r Int. Rev., 1929, 279 U.S. 716, 725 [7 AFTR 8875], that "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decisions of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided."

The fact that the statute designates the Tax Court as an "independent agency in the Executive Branch of the Government", does not make it such when Congress, admittedly, has provided that it shall have the powers and procedures of a court. As the *Stern* case says, the language placing the Tax Court in the Executive Branch for convenience of housekeeping is merely legal semantics.

It seems to petitioners that the law has developed as shown by the *Stern* decision. The cases repeatedly recognize that the Tax Court possesses the inherent

power of a Court and is bound by established rules of court decision.

The recent decision of the Fourth Circuit in *Fairmont Aluminum Co.* v. *Commissioner,* (1954) 222 F. (2d) 622 shows how the Courts of Appeals regard the Tax Court as exercising judicial functions, and being bound by judicial rules. The Court states:

> "The taxpayer contends also that the doctrine of collateral estoppel, or estoppel by judgment, may not be applied to proceedings of the Tax Court, which, it contends, is not a court at all but an administrative agency. It is perfectly clear, however, that whether the Tax Court be regarded as a court or as an administrative agency it is exercising judicial functions in hearing tax cases of this character; and, when exercising judicial functions, as distinguished from administrative functions[1] it is bound to apply such fundamental judicial doctrines as res judicata and estoppel."

> "[1] That res judicata and estoppel do not apply to administrative action, see *Houghton* v. *Payne,* 195 U.S. 88; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145; *N.L.R.B.* v. *Baltimore Trust Co.,* 4 Cir., 140 F. (2d) 51, 55; *Wallace Corp.* v. *N.L.R.B.,* 4 Cir., 141 F. (2d) 87, 91."

The Fourth Circuit, in deciding the *Fairmont* case, relied upon *Sunnen* v. *Commissioner,* (1948), 333 U. S. 591, wherein this Court had no difficulty in applying the rules of estoppel to a Tax Court case.

Another typical case is *Pelham Hall Co.* v. *Hassett,* (C.A. 1, 1945), 147 F. (2d) 63, which states (p. 66):

> "In a half-hearted way, the taxpayer contends that an essential requirement to the operation of estoppel by judgment is that the prior adjudication shall have been made by a court of competent jurisdiction; and that the Board of Tax Appeals

> is not a court but merely an executive or administrative board. See *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 1929, 279 U.S. 716, 725. * * * Since its reconstitution by the Revenue Act of 1926, the decisions of the Board (now renamed the Tax Court of the United States) have been essentially judicial in character; and it is now well settled that its decisions are a basis of res adjudicata whether they have been reviewed by a court or not. (citing cases) * * * "

Compare *Blair* v. *Commissioner*, 300 U. S. 5 (1937) where the Government argued that res judicata was applicable in a Tax Court case. Also, *United States* v. *International Bldg. Co.*, (1953) 345 U.S. 502 and annotation "Res judicata in income tax cases" 92 L. Ed. 913.

The Board of Tax Appeals has passed upon the constitutionality of taxing acts and has been affirmed or reversed by Courts of Appeals in so doing. This Court, without questioning the power of the Board to pass upon questions of constitutionality has decided those questions in cases which originated in the Board. See *Helvering* v. *Independent Life Ins. Co.*, (1934), 292 U. S. 371, reversing (C.A. 6) 67 F. (2d) 470, which had affirmed 17 B.T.A. 757. Obviously, only courts can determine the constitutionality of Acts of Congress.

The Tax Court has the power to declare Treasury Regulations invalid and has done so in many cases. *Helvering* v. *Credit Alliance Corp.*, (1942) 316 U. S. 107, affirming (C.A. 4) 122 F. (2d) 361, which affirmed 42 B.T.A. 1020; *Commissioner* v. *Gifford Hill & Co.*, (C.A. 5, 1950) 180 F. (2d) 655, affirming 11 T.C. 802.

The Tax Court has concurrent jurisdiction with District Courts in certain tax cases. (See § 7422 (e)

1954 Code) Likewise, it has concurrent jurisdiction with District Courts in bankruptcy cases, provided the action was filed in the Tax Court prior to the adjudication in bankruptcy. Section 274 1939 Code, section 6871 1954 Code.

The foregoing cases have been cited to show that the Tax Court has been accepted as a Court in many fields of law. There is no statutory authority giving the Tax Court power to declare Acts of Congress unconstitutional, to declare Treasury Regulations invalid, to apply rules of res judicata and the like. These are all powers inherent in a judicial tribunal.

If at this late date, it is not recognized that the Tax Court has the inherent power of any judicial tribunal and is bound by judicial rules and precedents, litigation will increase and havoc will be wrought in the administration of tax laws.

This Court has squarely held that the literal language of the Internal Revenue Code as to when a Tax Court decision becomes "final" must give way to accepted Court practice. In *R. Simpson & Co., Inc.* v. *Commissioner,* (1944) 321 U. S. 225, the question involved was the power of this Court to grant a rehearing of a denial of certiorari. The petition for rehearing of the denial of certiorari was not filed until after the expiration of the 25 days provided in the rules for such petitions for rehearing.

The question arose because § 1140 of the Internal Revenue Code (the same section involved in the case at bar) provides that a Tax Court decision becomes "final" under certain conditions, including:

> "Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the

petition for review dismissed by the Circuit Court of Appeals; * * *."

In the *Simpson* case, this Court refused to grant the petition for rehearing because filed more than 25 days after the denial of the petition. However, it directly held that this Court had the right to grant rehearings of denials of certiorari if petitions therefore were filed within the 25 days provided in the rules.[5]

It is our position that the *Simpson* case establishes the rule that the word "final" does not deprive courts in tax cases of the usual discretionary powers that

[5] In its brief in the *Simpson* case, the Government conceded, as we contend here, that a Court has inherent power to reconsider action it has taken. The brief states: "The Government does not contest the jurisdiction of the Court to grant the petition for rehearing of its order denying the petition for certiorari. The answer to the question whether the Court had the power to grant the petition for rehearing depends upon the proper construction of Section 1140 (b) (2) of the Internal Revenue Code. That subsection provides that decisions of the Board of Tax Appeals shall become 'final' where the circuit court of appeals has affirmed, upon 'the denial of a petition for certiorari'. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191, apparently holds 'final' to mean final in the sense that the decision of the Board may not thereafter be disturbed by the reviewing court. That case does not necessarily control here, however, since it dealt with another subsection of what is now Section 1140 which expressly limited to 30 days the period within which the Court might recall its mandate. Section 1140 provides no corresponding restriction as to orders denying certiorari. We suggest that 'the denial of a petition for certiorari' may be construed so as to preserve to the Court its inherent power, during the same term, to reconsider orders denying certiorari. So construed, the expression refers not to the action of the Court on certiorari in the first instance, but to its ultimate action during the same term."

judicial tribunals possess. The established rule is that a court has inherent power to relieve a party from a "final" judgment because of mistake, inadvertency, surprise or excusable neglect. This basic rule is now expressed by Rule 60 (b), Federal Rules of Civil Procedure, which states in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (6) any other reasons justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

While we do not contend that the Tax Court is bound by the Rules of Civil Procedure, we do contend that the Tax Court performs purely judicial functions. That being true, it has the inherent powers of any judicial tribunal to control, amend, open and vacate its decisions to accomplish justice.

In the Court below in the case at bar, much stress is laid upon *Helvering* v. *Northern Coal Co.*, (1934) 293 U. S. 191. In that case this Court had previously affirmed the Court of Appeals on the merits by an equally divided Court. Nearly six months after the mandates issued, petitions for rehearing were filed.

This Court held that it could not grant a re-hearing more than 30 days after the date of issuance of the mandates because of the statutory provision which reads that a Board of Tax Appeals' decision becomes final:

> "Upon the expiration of 30 days from the date of the issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

It is obvious that the later *Simpson* case greatly modified the earlier interpretation of Section 1140 in the *Northern Coal Co.* case in order to reach a result which "enables us to do justice to the party if he appears to have the right of the controversy * * *"

It is petitioners' position that there is no greater need for finality in tax cases, where third parties are not involved, than in bankruptcy cases where third parties are involved. This Court has held that a bankruptcy court may set aside an order dismissing a petition and rehear the cause after the time for appeal has expired. In *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U. S. 131, this Court stated (p. 136):

> "In the alternative, the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a fresh

order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress. But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry. * * * "

The mere fact that Section 1140, Internal Revenue Code, states when a decision of the Tax Court shall become final can have no unique significance on the power of the Tax Court over its decisions or judgments. There comes a time when the judgment or decision of all courts becomes final so as to preclude an appeal. For instance, a judgment or order of a United States District Court becomes final 30 days after its entry unless motions are made subsequent to its entry which terminate the running of the time for appeal. See Rule 73 (a) Federal Rules of Civil Procedure. However, the inherent power of the District Court to vacate its judgment after time for appeal has lapsed cannot be doubted.

Some of the decisions cited by the court below indicate that there is some peculiar necessity in Tax Court cases to know when a decision is "final" in order to inform the Commissioner when he can make an assessment, or allow a credit or make a refund. See *Denholm & McKay Co.* v. *Commissioner,* (C.A. 1, 1942) 132 F. (2d) 243, 30 AFTR 572. This position is not realistic. There is nothing sacred about an assessment. Assessments, credits, abatements and refunds of taxes are being made all the time. For example, in the case of a jeopardy assessment, the assessment is made and often the tax collected. Yet as the result of a settlement or a Tax Court decision the Commissioner may have to allow credits, abatements or refunds. No particular administrative problem would arise as the Commissioner would have the power to make the assessment until the decision was reversed or modified. Until the decision was reversed or modified on a proper showing, the assessment would continue in existence. The situation would be exactly the same as exists on an appeal from the Tax Court where the taxpayer

elects to pay the deficiency rather than give bond. If the Appellate Court reverses, the taxpayer receives a refund if he has paid the tax.[6] There is no greater necessity for finality in Tax Court cases than in bankruptcy cases where the rights of a debtor and creditors are involved. In fact, in Tax Court cases no rights of third parties will be involved. In the instant case, no rights of others have vested on the faith of the Court's decision of April 8, 1954. A United States District Court in a tax refund suit would have the power to vacate its judgment under the state of facts that exists in the case at bar. Consequently, it can be seen that from an administrative standpoint the fact that a "final" decision might be reopened or vacated does not create burdensome uncertainty.

It should be pointed out that § 1140 of the Internal Revenue Code does not mean that in all situations the decision becomes "final" within three months from the entry of decision if no petition for review is filed. In *Denholm & McKay Co.* v. *Commissioner,* (C.A. 1, 1942) 132 F. (2d) 243, 30 AFTR 572, it is stated at page 576:

> "Despite statutory provisions requiring appeals to be taken within a stated period 'after the entry of the judgment' or 'after the judgment is rendered' or words to the same effect, it has long been

[6] Section 1146, Internal Revenue Code of 1939 provides:

"SEC. 1146. *Refund, Credit, or Abatement of Amounts Disallowed.* In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Tax Court is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated."

> held that if a petition for rehearing is seasonably presented and entertained by the court, the time limited for appeal does not begin to run until the petition is disposed of. [citing many Supreme Court cases]. The foregoing rule has been applied to timely petitions for rehearing filed in the Board of Tax Appeals; in such cases the period for filing a petition for court review does not begin to run until the Board has disposed of the petition for rehearing. *Griffiths* v. *Commissioner,* 7 Cir. 1931, 50 F. (2d) 782; *Burnet* v. *Lexington Ice & Coal Co.,* 4 Cir. 1933, 62 F. (2d) 906; *Helvering* v. *Continental Oil Co.,* 1933, 63 App. D. C. 5, 68 F. (2d) 750; *Helvering* v. *Louis,* 1935, 64 App. D. C. 263, 77 F. (2d) 386, 99 A. L. R. 620. * * * "

The point is that Section 1140, Internal Revenue Code, dealing with the finality of decisions is interpreted the same as other statutes dealing with finality of judgments. Therefore, the cases cited by the court below which base their conclusion on the "peculiar" language of that section are out of step with *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* (1937) 300 U. S. 131, 81 L. Ed. 557.

As pointed out in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* the granting of a rehearing was discretionary with the trial court. Petitioners were before the Tax Court not as a matter of right on their motion to vacate the decisions but by special leave of Court. The Tax Court properly exercised its discretion in vacating the decisions and granting petitioner a further hearing on the merits since the additional evidence proffered showed the decisions of the Tax Court to be wrong.

We submit that as a matter of law, the rule as announced by the Sixth Circuit in the *Reo Motors* case should be adopted by this Court.

As stated at the outset of the argument, we deem it necessary to understand the legislative and judicial background, origin and functions of the Tax Court. Consequently, that information follows.

Legislative and Judicial History of The Tax Court of the United States (Formerly the Board of Tax Appeals)

When the first income tax law was enacted after the ratification of the Sixteenth Amendment, the Government had the power to summarily collect taxes.[7] Upon the basis of returns filed, or audits made, the amount of the tax determined was entered upon assessment lists and certified to various collectors for collection. If the taxes so assessed were not promptly paid, they were collected under warrants of distraint or by some other summary method. Whether the tax, or the amount thereof, was right or wrong, the taxpayer had no alternative but to pay. However, if the tax was paid under protest, the taxpayer had the right to file a claim for refund. If the claim for refund was rejected or not acted upon within a specified period of time, suit for recovery of the tax might be filed.

The First World War necessitated the collection of greatly increased revenue. This need was met by the enactment of very complicated and far-reaching income tax acts. These included not only a normal tax at a fixed rate on individuals, but also a surtax at graduated rates. An income tax at a flat rate was imposed on corporations. In addition, corporations

[7] This historical argument is based largely upon an address by Bolon B. Turner, Judge of the Tax Court, entitled: "The Tax Court of the United States, Its Origin and Functions", at the conference on The History and Philosophy of Taxation, held at the College of William and Mary in Virginia, April 15, 1955, pp. 31-49.

were subjected to war profits and excess profits tax at graduated rates. At that time even the concepts of what constituted income had not been too well settled, to say nothing of the applicability of the many new and complex provisions of the statute. This meant that, despite the earnest efforts of most taxpayers to report honestly their income and tax thereon, there was no assurance that upon audit of their returns, they would not be faced with claims for substantial amounts of additional tax.

The staff of the Bureau of Internal Revenue was inadequate to cope with the problem, with the result that taxpayers were likely to be faced with an assessment and demand for payment of a substantial amount of additional tax on the basis of a superficial examination of their returns. This demand for additional tax frequently was made many years after the alleged untaxed income had been earned. In many instances, war earnings had been lost in subsequent operations, or had been paid out in dividends or invested in fixed assets. All this meant that the policy of paying taxes when demanded, and litigating afterward, would often mean disaster to healthy and thriving enterprises. A later showing in a suit for refund that the tax was not due could not revive a business that had ceased to exist. Business, Government and Congressional leaders all agreed that something should be done to remedy the situation.

Treasury Recommendations for a Board of Tax Appeals

Revenue Act of 1924

By a letter dated November 10, 1923, to the Chairman of the Committee on Ways and Means, the Secretary of the Treasury recommended that the Congress

"establish a Board of Tax Appeals in the Treasury, but independent of the Bureau of Internal Revenue to hear and determine cases involving the assessment of internal revenue taxes."[8] The Revenue Bill, as reported to the House of Representatives, provided for the creation of a Board independent of the Treasury Department. The Report of the Ways and Means Committee stated in part:[9]

> "Under the provisions of the proposed bill creating a Board of Tax Appeals the taxpayer may, prior to the payment of the additional assessment of income, war-profits, excess-profits, or estate taxes, appeal to the Board of Tax Appeals and secure an impartial and disinterested determination of the issues involved. In the consideration of the appeal both the Government and the taxpayer will appear before the board to present their cases, with the result that each member of the board will sit solely as judge and not as both judge and advocate. * * * The divisions of the board will sit locally throughout the United States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable."

The bill provided that notice and opportunity to be heard should be given the taxpayer and the Commissioner and that a decision should be made as quickly as practicable. The bill then provided with respect to the proceedings, as follows:

> "The proceedings of the Board and its divisions shall be informal and in accordance with such rules as the Board may prescribe. Opinions (other than findings of fact) shall not be in writing

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[8] Annual Report of Secretary of Treasury, 1923, p. 10.

[9] Report No. 179, Ways & Means Committee, 68th Cong., 1st Session, p. 8.

unless the Chairman so desires. The findings of fact in each case shall be reported in writing."

After the bill had passed the House and had been reported to the Senate by the Committee on Finance, an amendment was offered on the floor of the Senate by Senator Jones of New Mexico to provide for a Board with a formal procedure. Supporting the amendment and covering its purposes, Senator Jones said in part:[10]

> "* * * The hearings are for judicial purposes. They are supposed to be conducted along the lines of judicial procedure. * * * They determine controversies between the Government and taxpayers. Evidence is to be submitted bearing upon the question, and a decision is to be reached which, for practical purposes, in most cases at least, is a final decision. * * * I submit that when there is a controversy between the Government and a taxpayer which shall follow through the various lines of procedure and finally reach the board of appeals, when it gets there all the proceedings should be public proceedings, the evidence should be taken down in writing, there should be a finding of fact and the decision of the board should be in writing and filed in the case just the same as in any other judicial proceeding, because that is what the case would be. It would be a judicial proceeding."

Senator Walsh, of Montana, supported the amendment, stating, in part, as follows:[11]

> "* * * I think that the proceedings ought to approximate as nearly as practicable to proceed-

[10] Congressional Record, May 8, 1924, p. 8132.

[11] Congressional Record, May 8, 1924, p. 8133.

> ings in court. It really is intended in a way as an equity judicial tribunal for the determination of those matters. There is no means that can be devised of making a court decide the cases aright in accordance with sound reason better than by requiring the court to file its opinion, showing to the world how it arrived at the conclusion which it reaches."

The amendment was adopted and subsequently, in a conference between the two Houses, it was accepted by the conferees of the House. This action was over the strenuous objection of Congressman Ogden Mills, a ranking member of the Committee on Ways and Means. When the conference report was before the House, Mr. Mills took the floor to speak against it.[12] After noting the recommendation of the Treasury Department for the creation of a board, with informal procedure, to settle tax cases, Mr. Mills, in part, said:

> "* * * this House passed a bill providing for the creation of a board of tax appeals, so that if the taxpayer was notified that his tax would be increased before the tax was assessed he had a right to go before that board of appeals, which was appointed by the President and was not a part of the Treasury Tax Bureau, but was an administrative body nevertheless. He would sit down with them, one member if necessary, and adjust his tax liability expeditiously and justly; and if the Government disagreed with the findings, the Government could go to court; and if the taxpayer was aggrieved, he could go to court. * * *"
>
> "* * * Now what the Senate did was to change the board of appeals, which was an administrative body sitting informally to adjust tax cases, into a

[12] Congressional Record for May 26, 1924, Part 9, Vol. 65, pp. 9539 and 9540.

> court of record, and the House conferees have agreed to that. * * * the testimony must be taken in writing, the rules of evidence apply, a written opinion is to be given, and all of the testimony in the proceeding is to be a public record."

Despite Mr. Mills' objection, the report was adopted and the bill became the Revenue Act of 1924. President Coolidge recognized the character of the tribunal which had been created. This is shown by the statement made at the time of signing the measure, which reads, in part:

> "The provisions of the bill, however, with reference to the Board, make it in all its essentials practically a court record. The Board is to be bound by formal rules of evidence and procedure. In each case a formal record must be prepared and all oral testimony * * * must be reduced to writing and an opinion in addition to the findings of fact and a decision must be written. * * * "

As created by the Revenue Act of 1924 the Board had no duties, purposes, or functions which were not judicial in character. Despite this it had no power to enter a final judgment or decision. The Act provided that either the taxpayer or the Government should have the right to institute a *de novo* proceeding in the proper District Court, or in the case of the taxpayer, in the Court of Claims, and thereby have the privilege of again litigating such part of the decision of the Board with which it was not in agreement.

It should be mentioned that this Court when deciding *Williamsport Wire Rope Co.* v. *United States,* (1928) 277 U. S. 551, obviously had not been advised of the legislative history of the Revenue Act of 1924. This is so because the opinion (pp. 562-563) relied upon

and cited the reports of the Ways and Means and Finance Committees. Justice Brandeis, when writing the opinion, apparently had not been informed that, after the writing of the Committee Reports, the entire character of the Board of Tax Appeals had been changed by an amendment on the Senate floor which was agreed to in conference. It is significant that the *Williamsport* case is one of the cases most frequently cited for the proposition that the Tax Court (formerly the Board of Tax Appeals) is a mere administrative agency.

Revenue Act of 1926

The Revenue Act of 1926 provided that decisions of the Board of Tax Appeals would be final and reviewable only by United States Courts of Appeals. A description of the legislative events leading up to the changes in the 1926 Act is helpful in understanding the intention of Congress to create a judicial rather than an administrative tribunal.

The Treasury Department completely changed its views as to the desirability of a formal judicial tribunal to determine tax controversies and recommended that the Board of Tax Appeals be given the power to enter decisions which would be reviewable only by the Circuit Courts of Appeals. Excerpts from the hearings on the 1926 Act are set forth in the appendix hereto, page 46.

The Ways and Means Committee Report of the 1926 Act states:[13]

> "In the view of the committee the decisions of the board are judicial and not legislative or

[13] House of Representatives Report No. 1, 68th Congress, 1st Session, p. 20.

administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decisions of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, * * * "

At page 18 of the report, it is stated:

"No other court in the world tries cases which in the aggregate involve such great amounts. * * * Under the appellate procedure from the board (hereinafter discussed) the jurisdiction of the board in tax matters is similar to that heretofore held by the judges of the Federal district courts."

At page 19, it is stated:

"The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court."

After the bill had passed the House, it was reported to the Senate by its Finance Committee, in a report which was in substance the same as that of the Committee on Ways and Means. During the debate on the floor of the Senate, the question was raised as to the character of evidence permissible in proceedings before the Board, fear being expressed that *ex parte* hearings might be conducted and that hearsay evidence might be admissible.

The floor discussion makes it clear that the Senate understood that the Board of Tax Appeals would func-

tion as a judicial tribunal and follow court procedure and rules of evidence. Excerpts from the discussion on the Senate floor are set forth in the appendix hereto, page 51.

The Revenue Act of 1926 incorporated the views expressed at the hearings and on the floor of the House and Senate. It provided in sections 1001-1005, that the hearings and proceedings were to follow as nearly as possible those in Federal District Courts. It was provided, also, that the admissibility of evidence should be determined according to the rules of evidence prevailing in courts of equity in the District of Columbia. A taxpayer could no longer proceed in the Board and if he lost there, have a trial *de novo* in the District Court, or in the Court of Claims. In the same way, the Government could no longer institute a new proceeding to collect taxes under claims decided against it by the Board. A taxpayer instituting a proceeding in the Board was faced with a decision which was final and thereafter had no right to litigate his liability anew in the District Court or the Court of Claims. The jurisdiction of the Board and of those Courts was for all practical purposes concurrent. It was further provided that there should be direct appeal to the proper Circuit Court of Appeals.

In addition to the procedural provisions, the 1926 Act in sections 273 and 284 provided that if an appeal was taken to the Board it had the power to determine the correct tax liability. It could increase the deficiency asserted by the Commissioner or determine that a refund was due the taxpayer.

After the enactment of the 1926 Act, an appeal was taken from the Board of Tax Appeals to the First Circuit. That Court certified to this Court the ques-

tion of whether such an appeal presented a "case or controversy" which could properly be heard by Courts of Appeals in exercising their judicial function. In *Old Colony Trust Co.* v. *Commissioner,* (1929) 279 U. S. 716, this Court answered in the affirmative.

Revenue Act of 1928

Prior to the enactment of the Revenue Act of 1928, the Seventh Circuit decided the case of *Chicago Railway Equipment Co.* v. *Blair,* (1927) 20 F. (2d) 10. The Ways and Means Committee Report[14] on the Revenue Act of 1928, referring to the *Chicago Railway Equipment Company* case, stated:

> "Force and Effect of Rules.—A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The Committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law."

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[14] House Report No. 2, 70th Congress, 1st Session, p. 30.

The Finance Committee was of the opinion that because the existing law clearly contemplated judicial and not administrative proceedings by the Board of Tax Appeals, further legislation on the subject was unnecessary. The Finance Committee report states:[15]

> "Modification or reversal of board decision. In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer."

Revenue Act of 1942

In the Revenue Act of 1942 the name of the Board of Tax Appeals was changed by an amendment, which read:

> "The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."

In 1948 Congress amended § 1141 (a), Internal Revenue Code of 1939 (§ 7842, 1954 Code), by Public Law No. 773, 80th Congress, 2d Session, by providing

[15] Senate Report No. 960, 70th Congress, 1st Session, p. 38.

that Courts of Appeals shall have exclusive jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." This amendment was made to overcome the rule of *Dobson* v. *Commissioner*, (1944), 320 U. S. 489, which made applicable to determinations of the Board of Tax Appeals the finality of administrative decisions in other fields. This is a further indication of the judicial nature of the Tax Court.

Internal Revenue Code of 1954

In the Internal Revenue Code of 1954, the provisions relating to the Tax Court are placed in Chapter 76, "Judicial Proceedings." That chapter also covers the jurisdiction of district courts in actions by or against the United States which involve taxes. It likewise includes the provisions governing appeals to Courts of Appeals and certiorari to this Court in tax cases. In the 1939 Code, the Tax Court provisions were not placed in the same chapter as the District Court provisions.

CONCLUSION

The law is established that the Tax Court is a judicial tribunal. As such, it has consistently exercised the inherent powers of a Court. This power to act as a judicial tribunal should be construed to give it the same control over its decisions and judgments as other trial courts.

Respectfully submitted,

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January 8, 1957

APPENDIX

STATUTES INVOLVED

Internal Revenue Code of 1939:

Sec. 272. PROCEDURE IN GENERAL.

* * * * *

(b) *Collection of Deficiency Found by the Tax Court.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h) *Final Decisions of Tax Court.*—For the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

* * * * *

Sec. 1100. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the chief judge and the judges of The Tax Court of the United States.

Sec. 1113. SERVICE OF PROCESS.

The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Tax Court shall be held sufficient service of such pleading, decision, order, notice, or process.

Sec. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made

by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of findings of fact or opinions in report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

(c) *Date of decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Tax Court dismisses a proceeding for lack of jurisdiction an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * *

SEC. 1140. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) *Petition for review not filed on time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision affirmed or petition for review dismissed.*—

(1) Petition for certiorari not filed on time.—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the court of appeals and no petition for certiorari has been duly filed; or

(2) Petition for certiorari denied.—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the court of appeals; or

(3) After mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the petition for review dismissed.

* * * * *

Sec. 1142. PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a court of appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

Internal Revenue Code of 1954:

Sec. 7422. CIVIL ACTIONS FOR REFUND.

* * * * *

(e) Stay of Proceedings—

If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

Sec. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

Hearings Before the Ways and Means Committee on the Revenue Bill of 1926[1]

A. W. Gregg, Solicitor of Internal Revenue, stated with respect to the Board of Tax Appeals:

> "* * * They have really done a wonderful piece of work in getting started, producing, and establishing the precedents that they have. It seems to me that in order to be able to carry out what they have begun so well, they should be made a court in name as well as in fact, and that provision should be made which will enable the board to procure the services of competent men; * * *."
>
> * * * * *
>
> "The Treasury Department originally recommended a board in the Treasury Department with informal procedure to settle tax cases. It was recognized at the time that there were two needs—one for a board to settle tax cases—and I mean settle them in the sense of settling them across the table—and the other a court to establish precedents, the latter not for its value in deciding the cases which would be presented to it, because they necessarily must be limited in number, but for the purpose of establishing prece-

[1] Hearings, Ways and Means Committee Revenue Revisions 1925, pg. 932, 68th Cong., 2nd Session.

dents to guide the bureau in the settlement of other cases and to guide the taxpayer in disposing of his case.

"The original recommendation of the Treasury Department was for a board to settle tax cases. Congress changed that and gave us the other, which was also much needed—a court to establish precedents for the disposition of other cases pending in the department.

"Having done that, it seems to me that Congress should go the whole way and establish it in name and in other respects as they have established it in fact—as a court; * * *.

* * * * *

Mr. Hadley: "Referring to the recommendation to make the board a court, I would like to ask, before you leave that, whether, aside from that, there are any features in the present status of the board that it will be necessary to change to give it the functions of a court?

Mr. Gregg: "I think if you make it a court the attributes that follow a court would take care of that, such as the matter of power to punish for contempt. I think that would belong to the court without any express statutory provision. Of course, that could be specifically taken care of.

"You can state almost without exception that where a taxpayer thinks a tax is not owing he is going to take advantage of his right of appeal to the board rather than pay the tax and file a claim for refund.

Mr. Chindblom: "Then it follows that the work of the Board of Tax Appeals would be continuous.

Mr. Gregg: "The work of the board will be reduced when the excess profits tax is disposed of, but there is going to be always a great deal of work for the board in connection with the income taxes alone.

Mr. Chindblom: "That would relieve the district courts of many of the refund cases?

Mr. Gregg: "Yes; it would relieve the district courts decidedly. I think in connection with the recommendation that the Board be made a court provision should be made for an appeal direct to the circuit court of appeals. There is no logic in having

a case go to the board and tried on its merits, with a careful finding of facts made and an opinion written, and then have the taxpayer file a claim for refund and put it up to the department again and then go back to the district court and start over again. It is in the interest of economy both of money and time to have an appeal direct from the board to the circuit court and have a final disposition of the case in the one proceeding.

Mr. Garner: "Suppose this committee or Congress should not be willing to create the board as a court as you have suggested. What amendment, if any, should be made with reference to its continuation as a board?

"I do not believe, speaking my sentiments as to what you could get through Congress, that you can get through Congress an amendment to the law making this board a court, and if we cannot do that what would be your suggestion with reference to the continuation of the board and the conditions under which it should work?"

Mr. Gregg: "Give it as many of the attributes of a court as possible without calling it a court. Provide for an appeal from the board direct to the circuit court of appeals. That can be done whether it is made a court or not.

"Make the term of office as long as you feel it proper to do and make the salary as high as possible"

Benjamin H. Littleton, who was the then Chairman of the Board of Tax Appeals and who is now a judge of the Court of Claims, in discussing the general operation of the Board since its creation said (Hearings, p. 562):

"There have been several mandamus proceedings instituted against the board, I think seven in number, some involving questions of jurisdiction and others involving questions of the board procedure. One case involving the board procedure has been decided, wherein the court decided that the board had to grant the taxpayer and the commissioner an opportunity to appear before the full board, upon review, holding that we did not have any legal right to refuse to do that.

The Chairman, Mr. Wm. R. Green: "I think I can safely say without making a canvass around the board, that that never was the intention of Congress.

* * * * *

Mr. Garner: "If Congress saw proper to give you the right to provide rules and regulations of procedure, and created you in every essential quality as a court, although calling you a board, I do not understand just how the courts would undertake to set that aside, and direct you as to your procedure. * * *"

Senate Debate, 1926 Act

Mr. Reed of Missouri: "And in the Board of Tax Appeals is it not true that they consider affidavits and letters and hearsay evidence of every sort—evidence that does not come within the ordinary rules of evidence?"

(Congressional Record, February 8, 1926, Vol. 67, page 3530)—

Mr. Reed of Pennsylvania: "I do not know what the practice has been in the past; but we have taken care that it shall not be so in the future, because we have provided in the bill that the rules of evidence in the Board of Tax Appeals shall be the same as those prevailing in the courts of equity in the District of Columbia; and if they should receive any such hearsay statements as the Senator has described, of course, that would be reversible error."

Mr. Reed of Missouri: "The reason why I ask the question is that my understanding is that the courts have sustained actions of boards based upon just the kind of evidence I described a moment ago."

Mr. Reed of Pennsylvania: "That is what we are trying to get away from now."

Mr. Reed of Missouri: "And I am glad to know that that has been avoided."

Mr. George: "Mr. President, if the Senator will pardon me, I may suggest that every reasonable effort has been made to bring this board out of the class of a mere administrative body into the status of a court; and I think the rules of evidence to which the Senator refers have been amply cared for in this provision."

The following statements were made from the floor of the Senate on February 11, 1926, in the consideration of the proposed Revenue Act of 1926:

Senate Page 3749

Mr. Norris: "I want to get the Senator's idea about some questions that have arisen in my mind regarding the Board of Tax Appeals. I believe that it is more or less, and ought to be more or less, of a judicial nature. They will pass purely and solely upon questions of law. Am I right in that statement?

Mr. King: "Questions of fact necessarily are involved."

Mr. Norris: "Oh, yes; I ought to modify my statement to that extent."

Mr. King: "They are in a sense nisi prius courts."

Mr. Norris: "But it is their duty to say what the law is on the facts as they find them?"

Mr. King: "Yes."

Mr. Norris: "They are just the same as any other court in that respect?"

Mr. King: "Yes."

Senate Page 3750

Mr. Norris: "It seems to me we are considering this tribunal as having a rather judicial aspect, and that, I think, is the way it ought to be considered. * * *"

Senate Page 3752

Mr. Shortridge: "I am merely inviting the Senator's attention and that of the other Senators to the proposition that we want a speedy and a correct determination of these cases, and this so-called Board of Tax Appeals is, in point of its functions, a judicial tribunal; and no taxpayer's claim, no demand of the Government, should be finally determined by that body without a thorough examination of the facts and the law.

"Moreover, I invite the Senator's attention to this proposition: The bill vests in the board the functions of a trial court. It is to hear and determine facts as well as to resolve the law applicable to those facts. It is not merely a tribunal to listen to arguments touch-

ing matters of law. They receive evidence, they listen to witnesses, they receive evidence oral and documentary, as a jury does. Therefore I am suggesting that the number, 16, when divided and holding court throughout this vast Republic, is not too great a number to speed on the work in hand."

Senate Page 3755

Mr. Reed of Pennsylvania: "The procedure outlined in the bill as reported from the committee treats the Board of Tax Appeals practically as a court of original jurisdiction. An appeal from the board to the circuit court of appeals is in all respects similar to an appeal from a district court to the circuit court of appeals. The case is reviewed on the record and the appellate court has the power to reverse, with or without a venire de novo, or to affirm, but it does not try the case de novo. It does not take testimony. The practice is appellate practice entirely."